

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

DELAWARE CORRECTIONAL OFFICERS ASSOCIATION,	:	
	:	
Charging Party,	:	<u>U.L.P. No. 00-07-286</u>
	:	
v.	:	
	:	
DELAWARE DEPARTMENT OF CORRECTION,	:	
	:	
Respondent.	:	

Appearances

David M. Boswell, Esq., Schmittinger & Rodriguez, P.A., for DCOA
Jerry M. Cutler, State Labor Relations Office, SPO for State

Background

The Delaware Department of Correction (“DOC” or “State”) is an agency of the State of Delaware and a public employer within the meaning of §1302(n) of the Public Employment Relations Act (“PERA”), 19 Del.C. Chapter 13 (1994). ¹

The Charging Party, Delaware Correctional Officers Association (“DCOA”) is an employee organization within the meaning of 19 Del.C. §1302(h). ² DCOA is the exclusive

¹ “Public employer” or “employer” means the State, any county of the State or any agency thereof, and/or any municipal corporation, municipality, city or town located within the State or any agency thereof, which upon the affirmative legislative act of its common council or other governing body has elected to come within the former Chapter 13 of this title, or which hereafter elects to come within this chapter, or which employs 100 or more full-time employees. 19 Del.C. §1302(n).

² “Employee organization” means any organization which admits to membership employees of a public employer and which has as a purpose the representation of such employees in collective bargaining, and includes any person acting as an officer, representative, or agent of said organization.

bargaining representative of the bargaining unit of uniformed correctional officers in Delaware's adult correctional facilities within the meaning of 19 Del.C. §1302(i).³

On July 25, 2000, DCOA filed this unfair labor practice charge alleging the State violated §1307, Unfair Labor Practices subsections (a)(1), (a)(2), (a)(3), and (a)(5) of the PERA, which provides:

- (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:
 - (1) Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under this chapter.
 - (2) Dominate, interfere with or assist in the formation, existence or administration of any labor organization.
 - (3) Encourage or discourage membership in any employee organization by discrimination in regard to hiring, tenure or other terms and conditions of employment.
 - (5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, except with respect to a discretionary subject.

On August 4, 2000, the State filed its Answer to the Charge, including new matter. DCOA amended its Charge on August 14, 2000, and filed its Response to New Matter on August 17, 2000.

On January 30, 2001, a Probable Cause Determination was issued. As there were no material issues of fact, the parties were directed to submit argument on the legal issues. The parties each submitted a single brief, with the final brief received on April 12, 2001.

The decision results from the record thus created by the parties.

ISSUE

Did the Delaware Department of Correction violate the Public Employment

³ "Exclusive bargaining representative" or "exclusive representative" means the employee organization which as a result of certification by the Board has the right and responsibility to be the collective bargaining agent of all employees in that bargaining unit.

Relations Act, 19 Del.C. §1307 (a)(1), (a)(2), (a)(3), and (a)(5, when it refused to provide DCOA with home addresses of bargaining unit members?

POSITIONS OF THE PARTIES

DCOA:

DCOA alleges the State's failure to provide home addresses in accordance with the 1996 Memorandum of Agreement interferes with or restrains the right of bargaining unit members to communicate with their exclusive representatives; interferes with the existence or administration of DCOA; violates the State's duty to bargain in good faith with DCOA; and otherwise discourages membership in an employee organization by preventing DCOA from contacting its bargaining unit members.

DCOA argues it must be able to communicate with all of the members of the bargaining unit in order to provide effective representation. The bargaining unit is comprised primarily of Correctional Officers who are assigned to secured correctional facilities statewide. Other bargaining unit members transport prisoners between facilities and courts throughout the state. DCOA argues it cannot conduct meaningful union activities in the workplace because of the secured nature of the facilities (many of which are full beyond designed capacity) and the type of work in which bargaining unit members are engaged.

The State has added at least 1100 bargaining unit positions and hired thousands of individuals into bargaining unit positions within the last seven years. The size and complexity of this bargaining unit requires that DCOA be able to contact bargaining unit members at their homes in order to facilitate effective communications.

DCOA does not allege the State agreed to provide employees' telephone numbers, but rather asserts that telephone numbers are necessary to its communication and representative

efforts. DCOA requests PERB order the State to provide telephone numbers as part of its requested remedy for the alleged unfair labor practice.

State:

The State asserts it did not commit an unfair labor practice in refusing to provide DCOA with the home addresses, arguing it acted in good faith based upon the advice of the Deputy Attorney General (“DAG”). The State bases its argument on the United State’s Supreme Court’s decision in US Dept. of Defense v. Federal Labor Relations Authority, 510 U.S. 487 (1994), and the 3rd Circuit Court of Appeals decision in Sheet Metal Workers Union v. U.S. Dept. of Veterans’ Affairs, 135 F.3d 891 (1998). The State argues the weak public interest in disclosure of home addresses under FOIA is outweighed by the personal privacy interest employees have in their home addresses.

Act Board which provides, “No collective bargaining agreement shall be valid or enforceable if its implementation ... would otherwise be contrary to law.” Based on the advice of the DAG, the State believed it would be contrary to law to continue to provide home addresses to DCOA.

The State also argues DCOA does not need home addresses from the employer, as this information is available to the union upon request from bargaining unit members. DCOA is contractually provided with the opportunity to meet with each new bargaining unit member for 45-60 minutes during the Employee Initial Training. DCOA is also provided, by contract, with “separate locked enclosed bulletin boards” in each institution for the Association’s exclusive use.

The State asserts it never agreed to provide employee’s home telephone numbers to DCOA and telephone numbers are protected by privacy interests and unnecessary for the Union to effectively represent bargaining unit members.

DISCUSSION

At all times relevant to this dispute, the State and DCOA were parties to a collective bargaining agreement, which term extended from October 11, 1996, through October 10, 1999.⁴ It is undisputed that on February 1, 1996, the State and DCOA executed this Memorandum of Understanding:

In recognition of the exclusive bargaining agent's obligation to represent all employees within the bargaining unit for collective bargaining purposes pursuant to 19 Del.C. Ch. 13, the Delaware Correctional Officers' Association ("DCOA") and the State of Delaware ("State") hereby agree to the following Memorandum of Understanding ("Memorandum"):

1. The State agrees to provide the DCOA with a semi-monthly list of all employees in the DCOA Department of Correction bargaining unit which contains the name, home addresses, position classification and employment date of each bargaining unit member;
2. The DCOA agrees that any and all information provided by the State pursuant to this Memorandum shall be used solely for official Association purposes in its role as exclusive representative;
3. The DCOA agrees to indemnify and hold the State harmless against any and all claims, demands, legal actions and other forms of liability that arise out of or by reason of any action taken or not taken by the State to comply with any term of this Memorandum; and
4. This Memorandum shall take effect and be implemented within 30 days of the signing of this Memorandum.
5. By entering into this Agreement, DCOA does not waive, but expressly retains any rights to request and receive from the State such additional information to which it may be entitled by law.

/s/ Velma (Sue) Joyce

For the DCOA

Date: 1 Feb. 96

/s/ Thomas LoFaro

For the State

Date: 2-1-96

By letter dated February 25, 2000, the State, through its Manager of Labor Relations,

advised DCOA, in relevant part:

. . . I notified you that we had received an informal opinion from the Attorney General's Office which indicated that providing employee home addresses to

⁴ As of the date this charge was filed, the parties were continuing to abide by the terms of this collective bargaining agreement while negotiating a successor agreement.

an exclusive bargaining agent may violate employees' privacy rights. As a result of this opinion, we will no longer be able to continue providing DCOA with home addresses of bargaining unit employees. For a more detailed review of this issue, you may wish to read the case of *Sheet Metal Workers Intl. v. US Dept. of Veterans Affairs*, 135 F.3d 891 (3rd Cir. 1998), in which the Court of Appeals held that disclosure of names, social security numbers and home addresses of employees to a union monitoring compliance with federal labor laws would constitute an unwarranted invasion of personal privacy. The appeals court adopted the reasoning of the United States Supreme Court in *U.S. Dept. of Defense v. Federal Labor Relations Authority*, 510 U.S. 487 (1994) in which the disclosure of home addresses of federal civil service employees by their employing agency to the employees' collective bargaining representative was denied on the basis of privacy concerns. The Court found it clear that the employees had a privacy interest in nondisclosure and in avoiding the influx of union related mail and, perhaps, union related telephone calls or visits. 510 US at 500 ...

The State has continued to provide DCOA with the names, position classifications and employment dates of bargaining unit employees this February 25, 2000 letter.

This charge raises two legal issues. First, whether the State violated the statute by unilaterally refusing to continue to comply with the terms of the parties' 1996 Memorandum of Agreement and ceasing to provide home addresses of bargaining unit employees to DCOA. The second issue is whether DCOA is entitled, as a matter of law, to home addresses and telephone numbers under the Public Employment Relations Act, independent of any negotiated agreement.

The duty to bargain in good faith under the Public Employment Relations Act ("PERA") obligates public employers to provide information to exclusive bargaining representatives that is necessary and relevant to those organizations in performing their representation duties. This obligation has been recognized by Delaware's Public Employment Relations Board, Court of Chancery, and Supreme Court. Bd. of Education of Colonial School District v. Colonial Education Association, DSEA/NEA, Del.Chan., CA 14383, II PERB 1343 (1996), *affirmed* Colonial Education Assn. v. Bd. of Education, Del.Supr., Case 129, 1996, 152 LRRM 2575, III PERB 1519 (1996), (citing Brandywine Affiliate, NCCEA/DSEA/NEA, v. Brandywine School

District, Del.PERB, ULP 85-06-005, I PERB 131, 149 (1986)); AAUP v. DSU, Del. PERB., Decision on Remand, ULP 95-10-159, III PERB 2177 (2001). ⁵

The PERB has held public employers have a general obligation to provide information that is needed by an exclusive bargaining representative in order to properly perform its duties. DSU v. AAUP, Del.PERB, ULP 95-10-159, III PERB 1651, 1663 (1997), *affirmed* DSU v. AAUP, Del.PERB, III PERB 1685 (1998):

It is well settled that an employer has an obligation, as part of its duty to bargain in good faith, to provide information needed by the Union to enforce and administer a collective bargaining agreement. An employer must furnish information that is of even probable or potential relevance to the Union's duties. The refusal by an employer to provide relevant information requested by the Union is a violation of Section 8(a)(5) and (1) of the Act. [citing Conrock Co. & Teamsters Local 420, 263 NLRB 183, 111 LRRM 1271 (1982).]

DCOA, as the statutory exclusive bargaining representative for all employees in the bargaining unit, is obligated by the PERA to fairly represent the interests of all bargaining unit employees, the non-members as well as the members. To perform this statutory duty adequately, an exclusive bargaining representative must be able to communicate with all the bargaining unit employees.

The State argues DCOA has alternative means available to it to contact the bargaining unit membership. Specifically, the parties' collective bargaining agreement provides DCOA the opportunity to participate in new employee orientation training, provides union bulletin boards in each facility, and allows DCOA to designate shop stewards. In Standard Oil Co. of California v. NLRB,⁶ the Ninth Circuit Court upheld

⁵ Prior Delaware PERB Rulings decided under the Public School Employment Relations Act, 14 Del.C. Chapter 40 (1982), and/or the Police Officers and Firefighters Employment Relations Act, 19 Del.C. Chapter 16 (1986), are controlling to the extent that the relevant provisions of those statutes are identical to those of the Public Employment Relations Act, 19 Del.C. Chapter 13 (1994). AFSCME v. Del. DOT, Del.PERB, ULP 95-01-111, II PERB 1279 (1995).

⁶ In Standard Oil Co. of California v. NLRB, 9th Cir., 339 F.2d 639, 69 LRRM 2014 (1968).

the National Labor Relations Board's ("NLRB") rejection of these types of alternative communications as insufficient, particularly during a period of negotiations:

The Company's duty to bargain collectively with the Union as the representative of ... employees was not fulfilled by bargaining with the Union if the Union had no means of communication with some of the ... employees represented by it, and it was readily within the power of the Company to make it possible for the Union to communicate with members of the unit who were not members of the Union.

... [T]he possession of an address list would enable the Union to poll the unit members as to their preferences and priorities in contract negotiations, their experiences and recommendations with respect to the operation of the grievance arbitration machinery, and their thoughts on the wisdom of striking over a particular issue. Standard Oil, Supra. ⁷

The Second Circuit Court also rejected alternative means in Prudential Insurance Company v. NLRB (2d Cir., 412 F.2d 77 (1969)). It held union bulletin boards, "... are not adequate to communicate ... any information too lengthy or complex to be read quickly, but which must more appropriately be studied for a period of time, or to poll the [bargaining unit employees] or solicit their opinions about bargaining objectives, contract administration or other related matters." Prudential, Supra.

In the instant case, the rapid growth of the bargaining unit and the large number of new employees hired over the life of the most recent collective bargaining agreement support DCOA's need for home addresses. The State's adult correctional facilities are staffed continuously, around the clock, 365 days each year, adding to the difficulty of contacting bargaining unit members across the unit. An exclusive bargaining representative must be able to inform bargaining unit employees on its negotiations with the employer and obtain their views as to bargaining priorities. The State does not contend providing home addresses created an

⁷ "Delaware law extends to State, county and municipal employees many of the same rights to ... bargain collectively that the [federal labor law] affords to employees in the private sector. In cases where the problems raised under Delaware's labor laws are similar to those that arise under the NLRB, Delaware could be expected to consider and in all likelihood, follow federal law. Confrancesco v. City of Wilmington, D.Del., 419 F. Supp. 109 (1976).

onerous or unreasonable burden. In fact, it readily admits it has provided this information in the past.

For these reasons, it is determined that home addresses, in this case, are reasonably necessary and relevant to DCOA in the proper performance of its representation duties under the PERA. Therefore, unless the release of this information is otherwise contrary to law, the State is obligated to provide the addresses under its duty to bargain in good faith.

The State argues it acted in good faith in relying on the advice of its Deputy Attorney General who concluded that providing employees home addresses to the union violated Delaware's Freedom of Information Act. In reaching this conclusion, the State relies on the U.S. Supreme Court's decision in US Department of Defense v. Federal Labor Relations Authority (510 U.S. 487 (1994) ("US Dept. of Defense")) and the 3rd Circuit Court's decision in Sheet Metal Workers Union v. US Dept. of Veteran's Affairs (135 F.3d 891 (1998)).

The PERB addressed the applicability of the Supreme Court's decision in US Dept. of Defense to issues arising under the Public Employment Relations Act in State of Delaware and AFSCME Council 81, Del.PERB, DS 00-05-284, III PERB Binder 2077 (2000). The Court held that because the disclosure of employees' home addresses were not required under the Federal Freedom of Information Act ("FOIA"), their disclosure was prohibited by the federal Privacy Act of 1974.

In reaching this conclusion, the Court engaged in a sequential analysis, examining first the applicable federal labor statute. It found home addresses of bargaining unit employees were normally maintained by and reasonably available to the federal employer, and had been held to be necessary to the collective bargaining process to allow unions to effectively communicate with represented employees, in other court and NLRB decisions. US DoD, *Supra*, at 493. The Court concluded that unless the disclosure of the requested home addresses was otherwise contrary to law, the employing federal agency would be required under FOIA to release the information.

The Court next considered the Federal Privacy Act which provides:

No [federal] agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to any other agency, except pursuant to a written request by, or with prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be ... (2) required under §552 of this title [the Federal FOIA]. 5 USC §552 (b)(2).

The Court found the requested addresses to be “records” within the broad terms of the Privacy Act, and then turned its analysis to whether the addresses were subject to disclosure under the federal FOIA.

In finding the addresses were not subject to federal FOIA disclosure, the Supreme Court balanced the “extent to which the disclosure would serve the ‘core purpose of the FOIA’ which is ‘contributing significantly to the public understanding of the operation or activities of the government’”. Finding no “public interest” in disclosure, the Court concluded the information was not subject to FOIA disclosure.

In the present matter, the State relies on the Supreme Court’s interpretation and application of the federal FOIA to support its position. The State’s argument, however, fails to consider the complete analysis. The Court prohibited the Department of Defense from releasing the home addresses because of the strict prohibitions of the federal Privacy Act, which were not exempted by FOIA. It is well established that the federal Privacy Act does not apply to state and local governments.⁸

Further, Delaware’s Freedom of Information Act includes a specific exemption for “any records involving labor negotiations or collective bargaining.” 29 Del.C. §10002(d)(8). Consequently, home addresses of employees, which have been determined earlier in this

⁸ “Overview of the Privacy Act of 1974”, 1997 Edition, U.S. Dept. of Justice, <http://www.oalj.dol.gov>, citing: Ortez v. Washington County, Or., 88 F.3d 804 (9th Cir., 1996); Brown v. Kelly, No. 93-5222, slip op. at 1 (D.C. Cir., 1994)(*per curiam*); Monk v. Teeter, No. 89-16333, slip op. at 4 (9th Cir., 1991); Davidson v. Georgia, 622 F.2d 896 (5th Cir., 1980); Ferguson v. Alabama Criminal Justice Info. Ctr. 962 F.Supp 1446 (M.D. Ala. 1997); Williams v. District of Columbia, No. 95 CV 0936, 1996 WL 422328 at 2 (D.D.C., 1996); Martinson v. Violent Drug Traffickers Project, No. 95-2161, 1996 WL 411590 at 1 (D.D.C., 1996), summary affirmance granted, No. 96-5262 (D.C. Cir., 1997); Mamarella v. County of Westchester, 898 F. Supp 236 (S.D.N.Y., 1995); Reno v. United States, No. 4:94VC243, 1995; Connolly v. Beckett, 863 F. Supp. 1379 (D.Colo. 1994); MR by RR v. Lincolnwood Bd. of Education, District 74, No. 94-1357, 1995 U.S. App. LEXIS 10781 (7th Cir., 1995); Malevich v. United States Postal Service, No. 91-4871, slip op. at 19 (D.N.J., 1993), *aff’d* 27 F.3d 557 (3d Cir., 1994); Shields v. Shetler, 682 F.Supp. 1172 (D. Colo., 1988); Ryans v. New Jersey Commission, 542 F.Supp. 841 (D.N.J., 1982).

decision to be records necessary to DCOA in this case for purpose of collective bargaining, would be exempted from FOIA disclosure. Because Delaware is not subject to the federal Privacy Act, or any state corollary, the employer is not otherwise prohibited from providing this relevant and necessary collective bargaining information to the union, under its duty to bargain in good faith under the PERA.

The State entered into a contractual agreement with DCOA to provide names, home addresses, position classifications and employment dates for bargaining unit members. There is no indication in the record that employee telephone numbers were included in this agreement; nor does DCOA present evidence in support of its purported need for this additional information. Where the union has the name and home address of any individual employee, it has the ability to contact the employee and request a telephone number. There is nothing in the record which suggests that the State maintains telephone numbers in its records. For these reasons, I conclude the record is insufficient to find the State violated the Public Employment Relations Act by not providing DCOA with home telephone numbers of bargaining unit employees.

CONCLUSIONS OF LAW

Consistent with the foregoing discussion and findings:

1. The Delaware Department of Correction (“DOC” or “State”) is an agency of the State of Delaware and a public employer within the meaning of §1302(n) of the Public Employment Relations Act (“PERA”), 19 Del.C. Chapter 13 (1994)
2. The Delaware Correctional Officers Association (“DCOA”) is an employee organization within the meaning of 19 Del.C. §1302(h).
3. DCOA is the exclusive bargaining representative of the bargaining unit of uniformed correctional officers in Delaware’s adult correctional facilities within the meaning of 19 Del.C. §1302(i).
4. Home addresses of bargaining unit employees are reasonably relevant and necessary to DCOA in properly performing its statutory duties to represent those employees, and the

disclosure of the home addresses to the exclusive bargaining representative as part of the collective bargaining process is not prohibited by 19 Del.C. Chapter 100.

5. By refusing to provide DCOA with the home addresses of bargaining unit employees which are reasonably relevant and necessary to DCOA properly performing its statutory duties to represent those employees, the State failed to bargain in good faith and violated 19 Del.C. §1307(a)(1) and (a)(5).

6. There is no basis on this record to conclude the State dominated, interfered with, or assisted in the formation, existence or administration of DCOA in violation of 19 Del.C. §1307(a)(2), or encouraged or discouraged membership in DCOA by discrimination in regard to hiring, tenure or other terms of employment in violation of 19 Del.C. §1307(a)(3).

7. There is no evidence the State violated the statute by not providing DCOA with home telephone numbers of bargaining unit employees.

WHEREFORE, the State is hereby ordered to:

- I. Cease and desist from refusing to provide DCOA with the home addresses of bargaining unit employees.
- II. Within ten (10) days of receipt of the Notice of Determination from the Public Employment Relations Board, post notices in all areas where notices of general interest to the bargaining unit employees are normally posted, including but not limited to all locations to which bargaining unit employees are normally assigned.

IT IS SO ORDERED

/s/Deborah L. Murray-Sheppard
DEBORAH L. MURRAY-SHEPPARD
PRINCIPAL ASSISTANT/HEARING OFFICER
DEL. PUBLIC EMPLOYMENT RELATIONS BD.

DATED: 18 May 2001